

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Brian D. Balfanz,

Petitioner,

vs.

City of St. Paul,

Respondent.

**ORDER DENYING  
CITY OF ST. PAUL'S MOTION FOR  
SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Jeanne M. Cochran on a Motion for Summary Disposition (Motion) filed by the City of St. Paul on January 21, 2014. Brian D. Balfanz filed his response on February 7, 2014. The Motion record closed on that date.<sup>1</sup>

Rachel G. Tierney, Assistant St. Paul City Attorney, represents the City of St. Paul (City or Respondent). John D. Baker, Baker Williams LLP, represents Brian D. Balfanz (Petitioner).

Based upon the record, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

**ORDER**

**IT IS HEREBY ORDERED** that:

- (1) The City's Motion for Summary Disposition is **DENIED**.

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<sup>1</sup> Minn. R. 1400.6600.

- (2) This matter will proceed to an evidentiary hearing on **Thursday, April 3, 2014 at 9:30 a.m.** at the Office of Administrative Hearings, 600 N. Robert Street, St. Paul, MN.

Dated: February 25, 2014

s/Jeanne M. Cochran  
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JEANNE M. COCHRAN  
Administrative Law Judge

## MEMORANDUM

### Background

The Petitioner in this case is a veteran.<sup>2</sup> He received an honorable discharge from the Army, and is forty percent disabled as determined by the Department of Veterans Affairs.<sup>3</sup>

The Petitioner has been employed by the City of St. Paul since January of 2000.<sup>4</sup> He began his career with the City as an Engineering Aide II. He was promoted to Research Analyst I in June 2001, and to Research Analyst II in January 2006.<sup>5</sup> He is still employed as a Research Analyst II with the City.<sup>6</sup>

On March 29, 2013, the City posted openings for three full-time positions as a Park and Recreation Supervisor.<sup>7</sup> The posting notified potential applicants that the positions were “open to anyone who meets the position requirements.”<sup>8</sup> The posting also stated that the selection process would involve two parts: a Training and Experience Exam, and an Oral Presentation. The posting provided that:

Only candidates who achieve a passing score of 75% on the Training and Experience Exam will be allowed to participate in the Oral Presentation....

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<sup>2</sup> Affidavit (Aff.) of Brian D. Balfanz at ¶ 5 (attached to Petitioner's Response Motion to Respondent's Motion for Summary Disposition (February 7, 2014) (Petitioner's Response)); Aff. of Lisa McKeown, Exhibits (Exs.) C, D (attached to the Memorandum of Law in Support of Respondent's Motion for Summary Disposition (January 21, 2014) (City's Memorandum)).

<sup>3</sup> Aff. of B. Balfanz at ¶ 6; Aff. of L. McKeown, Ex. C.

<sup>4</sup> Aff. of B. Balfanz at ¶ 4; Aff. of L. McKeown at ¶ 8, Ex. A.

<sup>5</sup> Aff. of L. McKeown, Ex. A.

<sup>6</sup> Aff. of B. Balfanz at ¶¶ 1-2.

<sup>7</sup> *Id.*, Ex. A.

<sup>8</sup> *Id.*

Final Scores will be calculated as follows: (Training and Experience Exam Score\*.60) + (Oral Presentation Score\*.40)<sup>9</sup>

The Petitioner applied for the position of Park and Recreation Supervisor on April 10, 2013.<sup>10</sup> The Petitioner received a passing score on the Training and Experience Exam, and was allowed to participate in the Oral Presentation. In addition to Petitioner, 16 other promotional candidates and 17 new, outside candidates passed the Training and Experience Exam.<sup>11</sup> Because a higher than expected number of applicants passed the initial test, the City decided to have only the promotional candidates participate in the Oral Presentation. No outside candidates were invited to do the Oral Presentation.<sup>12</sup>

After completing the Oral Presentation, the Petitioner received a final score of 75.7. This placed him 13<sup>th</sup> on the list of promotional candidates. The City did not add any points to the Petitioner's score for being a veteran.<sup>13</sup> The top-ranked promotional candidate scored 85.4 out of 100.<sup>14</sup> The Petitioner was not interviewed by the City for any of the three openings for Park and Recreation Supervisor. Those positions were filled with other promotional candidates.<sup>15</sup> The Petitioner has challenged the City's hiring process for the Park and Recreation Supervisor openings under the Veterans Preference Act, Minn. Stat. § 197.455, alleging that the City violated the Act by failing to add points to his examination score based on his status as a veteran.<sup>16</sup>

### **The Veterans Preference Act (Act)**

The law is well settled in Minnesota that political subdivisions, including the City of St. Paul, must afford a hiring preference to veterans as specified in the Act.<sup>17</sup> Pursuant to the Act, political subdivisions are required to add points to a veteran's job examination score in certain circumstances.<sup>18</sup> The Veterans Preference Act provides in relevant part:

#### **Subd. 4. Nondisabled veteran's credit.**

There shall be *added to the competitive open examination rating* of a nondisabled veteran, who so elects, *a credit of ten points* provided that the veteran obtained a passing rating on the examination without the addition of the credit points.

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<sup>9</sup> *Id.*

<sup>10</sup> Aff. of B. Balfanz at ¶ 8, Ex. B.

<sup>11</sup> Aff. of L. McKeown at ¶ 10.

<sup>12</sup> *Id.* at ¶¶ 10-11.

<sup>13</sup> *Id.* at ¶ 15; Aff. of B. Balfanz at ¶ 17.

<sup>14</sup> *Id.* at ¶ 14.

<sup>15</sup> See *id.* at ¶ 14; City's Memorandum at 5.

<sup>16</sup> Aff. of B. Balfanz at ¶ 18.

<sup>17</sup> Minn. Stat. § 197.455.

<sup>18</sup> *Id.*, subds. 4-6.

**Subd. 5 Disabled veteran's credit.**

*There shall be added to the competitive open examination rating of a disabled veteran, who so elects, a credit of 15 points provided that the veteran obtained a passing rating on the examination without the addition of the credit points. There shall be added to the competitive promotional examination rating of a disabled veteran, who so elects, a credit of five points provided that (1) the veteran obtained a passing rating on the examination without the addition of the credit points; and (2) the veteran is applying for a first promotion after securing public employment.*

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**Subd. 6. Disabled veteran; definitions.**

For the purpose of the preference to be used in securing appointment from a competitive open examination, "disabled veteran" means a person who has a compensable service-connected disability as adjudicated by the United States Veterans Administration, or by the retirement board of one of the several branches of the armed forces, which disability is existing at the time preference is claimed. For purposes of the preference to be used in securing appointment from a competitive promotional examination, "disabled veteran" means a person who, at the time of election to use a promotional preference, is entitled to disability compensation under laws administered by the Veterans Administration for a permanent service-connected disability rated at 50 percent or more.

While the term "disabled veteran" is defined, the terms "competitive open examination" and "competitive promotional examination" are not defined in statute.<sup>19</sup>

As specified in subdivisions 4 through 6 of the Act, the determination of whether points are to be added to a veteran's job examination score depends on the type of examination that is administered (open or promotional) and whether the veteran is disabled or nondisabled. For an open examination, all veterans with a passing score are entitled to additional points, but the number of points varies between nondisabled and disabled veterans.<sup>20</sup> Nondisabled veterans are entitled to ten (10) additional points and disabled veterans are entitled to fifteen (15) additional points.<sup>21</sup> For a promotional examination, only disabled veterans with a passing score are entitled to additional points and, then, only if the veteran is applying for a first promotion after securing public employment.<sup>22</sup>

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<sup>19</sup> Minn. Stat. § 197.455.

<sup>20</sup> *Id.*, subds. 4-5.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, subd. 5.

## Positions of the Parties

The City has moved for summary disposition arguing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. The City claims that it was not required to add any points to the Petitioner's score under the Act because the facts show that the City administered a "competitive promotional examination," the Petitioner is not "disabled" as defined by the Act, and the Petitioner has already received a promotion from the City. In support of its position, the City submitted the Affidavit of Lisa McKeown, City Human Resources Manager. Ms. McKeown states that the test administered by the City for the Park and Recreation Program Supervisor positions was a competitive promotional examination and notes that only promotional candidates were allowed to complete the test.<sup>23</sup> Ms. McKeown also provides information showing that the Petitioner is only 40 percent disabled and therefore does not qualify for the disabled veteran's promotional credit.<sup>24</sup> Finally, she notes that the Petitioner has already received a promotion at the City. So, he was not applying for his first promotion.<sup>25</sup> For these reasons, the City claims that it scored the Petitioner's examination in compliance with the Act, and it is entitled to summary disposition.

The Petitioner opposes the City's Motion, arguing that a genuine issue of material fact exists, which requires the matter to proceed to an evidentiary hearing. The Petitioner asserts that the facts show that the examination administered by the City was actually a "competitive open examination."<sup>26</sup> In support of its position, the Petitioner filed his affidavit and accompanying exhibits. The Petitioner states in his affidavit that he was told by Lisa McKeown, City Human Resources Manager, that the examination given for the Park and Recreation Program Supervisor openings was "open and competitive."<sup>27</sup> The Petitioner also notes that the posting for the position stated that it was open to all qualified applicants.<sup>28</sup> In addition, the Petitioner provided a memorandum from the Minnesota House of Representatives Research Department which states that "if the position for which the City was hiring was posted in a manner intended to solicit at least some applications from persons not currently working for the City, then it should be considered to have been filled through an '**open competitive**' hiring process."<sup>29</sup> The Petitioner asserts that this evidence demonstrates that there is a disputed issue of material fact regarding whether the examination given by the City was "open" or "promotional," and therefore summary disposition must be denied.

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<sup>23</sup> Aff. of L. McKeown at ¶¶ 11-13, 16.

<sup>24</sup> *Id.* at ¶¶ 15, 19, Ex. C.

<sup>25</sup> *Id.* at ¶ 15.

<sup>26</sup> Petitioner's Response at 3.

<sup>27</sup> Aff. of B. Balfanz at ¶ 19.

<sup>28</sup> *Id.* at ¶ 7, Ex. A.

<sup>29</sup> *Id.*, Ex. L at 3 (emphasis in the original).

## Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment.<sup>30</sup> The granting of a motion for summary disposition is appropriate when there is no genuine dispute as to the material facts involved in a contested case and the law as applied to those undisputed facts clearly requires a ruling in favor of one of the parties.<sup>31</sup> The Office of Administrative Hearings has generally followed the summary judgment standards developed in the state courts when considering motions for summary disposition in contested case matters.<sup>32</sup>

The party filing the motion (here, the City) must demonstrate that there are no genuine issues of material fact that would preclude disposition of the case as a matter of law.<sup>33</sup> When considering a motion for summary disposition, the tribunal must view the facts in the light most favorable to the non-moving party.<sup>34</sup> All doubts and factual inferences must be resolved against the moving party.<sup>35</sup> If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.<sup>36</sup>

In order to defeat an otherwise proper motion for summary disposition, the non-moving party (here, the Petitioner) must show the existence of material facts that are genuinely disputed.<sup>37</sup> A genuine issue is one that is not a sham or frivolous, and a material fact is one that will affect the outcome of the case.<sup>38</sup> It is not sufficient for the non-moving party to rely on mere averments or denials; it must present specific facts demonstrating a genuine issue for trial.<sup>39</sup>

## Legal Analysis

Viewing the evidence in the light most favorable to the Petitioner, the Administrative Law Judge concludes that the Petitioner has demonstrated that a genuine issue of material fact exists and the City's Motion must be denied. The affidavits and exhibits filed by the parties demonstrate there is a factual dispute regarding the type of examination given by the City. The Petitioner has presented evidence showing that the examination was "open," and the City has presented

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<sup>30</sup> Minn. R. 1400.5500 (K); see *Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004).

<sup>31</sup> Minn. R. Civ. P. 56.03 and Minn. R. 1400.5500(K); see *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1988).

<sup>32</sup> Minn. R. 1400.6600.

<sup>33</sup> *Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

<sup>34</sup> See, e.g., *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993); *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

<sup>35</sup> *Thiele*, 425 N.W.2d at 583.

<sup>36</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

<sup>37</sup> See *Murphy v. Country House, Inc.*, 240 N.W. 2d 507, 511-12 (Minn. 1976); *Borom v. City of St. Paul*, 184 N.W.2d 595, 597 (Minn. 1971).

<sup>38</sup> See, e.g., *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996); *Highland Chateau v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984), *rev. denied* (Minn. Feb. 6, 1985).

<sup>39</sup> Minn. R. Civ. P. 56.05.

evidence showing the examination was “promotional.” Whether the examination was “open” or “promotional” is a material issue of fact because it affects the outcome of the case. If the examination was an “open” examination, the Petitioner would have been entitled to ten (10) extra points on his score under the Act as a veteran.<sup>40</sup> If the examination was a “promotional” examination, the Petitioner would not have been entitled to any extra points on his score because he is not “disabled” as defined by the Act and because this position would not have been his first promotion.<sup>41</sup> Thus, whether the City violated the Act when it decided **not** to add any additional points to the Petitioner’s score based on his status as a veteran depends on whether the examination was “open” or “promotional.” Accordingly, the Petitioner has demonstrated that there is a material issue of disputed fact, and the matter must proceed to an evidentiary hearing on the question of whether the examination was “open” or “promotional.”

**J. M. C.**

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<sup>40</sup> Minn. Stat. § 197.455, subd. 4.

<sup>41</sup> *Id.*, subd. 5.